



POLICE DEPARTMENT

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In the Matter of the Disciplinary Proceedings :

- against - : FINAL

Sergeant Fitzroy Vigilance : ORDER
Tax Registry No. 918667 : OF
Manhattan Court Section : DISMISSAL
-----X

Sergeant Fitzroy Vigilance, Tax Registry No. 918667, having been served with written notice, has been tried on written Charges and Specifications numbered 2021-23061, as set forth on form P.D. 468-121, dated January 22, 2021 and after a review of the entire record, Respondent is found Guilty.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Sergeant Fitzroy Vigilance from the Police Service of the City of New York.


DERMOT F. SHEA
POLICE COMMISSIONER

EFFECTIVE: 2/12/21



POLICE DEPARTMENT

February 9, 2021

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In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2021-23061
Sergeant Fitzroy Vigilance	:	
Tax Registry No. 918667	:	
Manhattan Court Section	:	

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At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Samuel Yee, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Andrew Quinn, Esq.
The Quinn Law Firm
Crosswest Office Center
399 Knollwood Road – Suite 220
White Plains, NY 10603

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Sergeant Fitzroy Vigilance, while on duty and assigned to the 71st Precinct, on or about January 3, 2021, wrongfully used a chokehold against a prisoner.

P.G. 221-01

FORCE GUIDELINES
TACTICAL OPERATIONS

P.G. 221-02

USE OF FORCE
TACTICAL OPERATIONS

2. Sergeant Fitzroy Vigilance, while on duty and assigned to the 71st Precinct, on or about January 3, 2021, wrongfully used force against a hand-cuffed and shackled prisoner.

P.G. 221-01

FORCE GUIDELINES
TACTICAL OPERATIONS

P.G. 221-02

USE OF FORCE
TACTICAL OPERATIONS

REPORT AND RECOMMENDATION

An expedited trial in the above-referenced matter was held before me on February 3, 2021. Respondent, who has twenty-three years of service with the Department, submitted an application for service retirement. His effective date of retirement is scheduled for February 28, 2021. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Sergeant Yuriy Chuyko and Sergeant John Huldie as its witnesses. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty and recommend that Respondent be DISMISSED from the Department.

ANALYSIS

In this case, it is undisputed that on January 3, 2021, Respondent was assigned as the Desk Officer in the 71 Precinct. A prisoner (hereinafter "Prisoner") was brought into the

precinct. The 71 Precinct had two holding cells. On that date, a female was being held in one of those cells; a male was in the other cell. A fixed video camera in the cell area and Police Officer Wanunu's body worn camera recorded the interaction between Respondent and Prisoner. (Dep't Exs. 1 - video only; and 2 - audio and video)

The videos show that Prisoner became uncooperative, agitated, belligerent and verbally abusive to officers he encountered in the precinct. While he was still outside of a cell, Prisoner's leg shackles were removed but he remained rear-handcuffed. Prisoner told the officers in the area that he did not want to be placed into the cell with the other male while still handcuffed. Prisoner was agitated and said he was going to fight the other male and verbally threatened to break his nose. (Dep't Ex. 2 at 15:00-17:40)

While the other male who had been in the cell was in the bathroom, Prisoner was placed into the cell by himself. He continued to curse at a female lieutenant and other officers in the area. Prisoner stated that the other male was not coming in the cell and challenged the officers to tase him or fight him. He said, "We are gonna die," and threatened to break someone's face. Officers entered the cell and, without any use of force, placed Prisoner in leg shackles upon the direction of Respondent. Those officers exited the cell. One officer attempted to deescalate the encounter by speaking calmly to Prisoner. This attempt was unsuccessful. (Dep't Ex. 2 at 18:20-21:25)

When the other male returned from the bathroom, Respondent stood behind him just outside the entrance to the cell. As the other male approached the threshold of the cell, Prisoner moved to the entrance of the cell and stated, "You're not coming in here. This is my cell." (Dep't Ex. 2 at 21:25-21:30) At that point, Respondent stepped in front of the other male, entered the cell, and pushed Prisoner towards the back wall of the cell. Prisoner was still rear-

handcuffed and leg shackled at this time. Respondent yelled at Prisoner, "Sit your fucking ass down." Prisoner took a few steps towards Respondent, who had his back to the open cell door. Respondent used two hands and pushed Prisoner to the wall for a second time. Respondent then put his right hand under the jaw area of Prisoner, told him to stop this "bullshit," and held him against the side cell wall. Respondent, while continuing this hold, pushed Prisoner down to the floor. Prisoner hit his head and started to bleed profusely. Respondent continued to yell at Prisoner to stop the "bullshit." (*Id.* at approximately 21:30-21:45; Dep't Ex. 1)

Prisoner remained on the floor bleeding from his head. Respondent rendered aid by pressing paper towels against the wound and within seconds directed that an ambulance be called. EMS arrived and removed Prisoner to the hospital. Prisoner received seven staples in his head to close the laceration. (Dep't Ex. 2 at 21:50-23:32; Dep't. Ex. 4B; Dep't Ex. 5A at 7)

Respondent in this case has been charged with wrongfully using a chokehold against a prisoner (Specification 1) and wrongfully using force against a hand-cuffed and shackled prisoner (Specification 2).

Prisoner did not appear to testify at trial, despite being subpoenaed. Instead, Sergeant Yuriy Chuyko, assigned to IAB, testified that he interviewed Prisoner at Brooklyn Central Booking on January 4, 2021. He took pictures of Prisoner's head, which show a laceration closed by seven staples. (Dep't. Ex. 4B). Prisoner told Sergeant Chuyko that he did not remember if he was pushed or punched or whether he was even cuffed at the time of the incident. He did not assert that a chokehold was used but did stress that he felt "excruciating pain" when Respondent grabbed and twisted his arm. He stated that he was letting an officer know he felt he was being unfair and next thing he knew he was on the floor and his head was bleeding. Prisoner also stated during the interview that the only injury he felt he sustained from the officer was the

big gash on his head. Prisoner explained to Sergeant Chuyko that he sustained a “very severe head injury” and therefore shouldn’t be blamed if he didn’t remember the moments right before the injury. (Dep’t. Ex. 5A, at 3-7; Tr. 18, 24-25)

On the advice of counsel, Respondent refused to testify at trial despite being ordered to do so by a ranking officer, Lieutenant Jose Diaz. The Lieutenant advised Respondent that this refusal could be grounds for suspension and termination. (Tr. 61-66) It is well-established that where a party to a civil matter refuses to provide testimony on his own behalf, the failure to do so allows the hearing officer to draw an adverse inference that the testimony would have been unfavorable to that party. *See Matter of Reis*, 96 A.D.3d 53 (1st Dep’t 2012) (in a professional disciplinary matter, an adverse inference may be drawn from a respondent’s invocation of the Fifth Amendment privilege against self-incrimination); *see also Dean v. Bradford*, 158 A.D.2d 772, 774 (3d Dep’t 1990) (in a disciplinary case, employee’s failure to testify allows the hearing officer “to draw all adverse inferences which the evidence permits”). Here, however, the tribunal need not make such inferences because the video evidence provides a clear and convincing depiction of Respondent’s participation in this incident and his culpability.

The tribunal did review the transcript of Respondent’s January 27, 2021, official Department interview, which was admitted into evidence as Department Exhibit 3. These hearsay statements, however, are not accorded the same weight as testimony given under oath in court which has been subject to cross-examination. In the interview, Respondent first asserted that he did not recall where he placed his hand on Prisoner. After being shown a video of the encounter, Respondent stated it looked like his hand was on “the lower portion of his jaw” or “a little below his chin.” Respondent did not consider the area to be the throat. Respondent also

told the investigators that when he took Prisoner to the ground his hand was just underneath his chin and that he never made contact with Prisoner's neck or throat. (Dep't. Ex. 3A at 15-17, 21)

With regard to Specification 1, Patrol Guide 221-01(2)(b) makes it clear that a Member of Service shall not use a chokehold. A chokehold is defined in the Patrol Guide as including but not being limited to, "any pressure to the throat, carotid artery or windpipe, which *may* prevent or hinder breathing or reduce intake of air or blood flow" (emphasis added). I find that Respondent violated this prohibition.

Dep't. Ex. 1 at approximately 00:06-00:09 is the clearest visual evidence of Respondent placing his hand in the vicinity of Prisoner's neck. His hand can be seen under Prisoner's chin with both his thumb and other fingers pointed in an upward direction. Respondent claims he did not have his hand on Prisoner's neck and throat. The Court finds it more likely than not that he did in fact have his hand positioned in a way that applied pressure to the throat, carotid artery or windpipe which may have hindered Prisoner's breathing, air intake or blood flow. Respondent's fingers were pointing up along the side of Prisoner's jaw but the palm of his hand was in a position under the face mask area which covered Respondent's lower chin. Respondent's palm more likely than not had to have contact with Prisoner's throat or windpipe area since Respondent exerted enough force with his hand positioned this way to not only hold Prisoner against the wall but to then push him down to the floor.

I reject the Defense argument that there was no chokehold because none of the other officers present stated in their interviews that Respondent used a chokehold. First, another officer's interpretation of the situation is not dispositive as to whether a chokehold was applied. Second, the only transcript of these interviews in evidence is that of Officer Wanunu, who stated that after Respondent's second push of Prisoner he turned away from the cell and was focusing

on the other male. By the time he looked back into the cell, Prisoner was on the floor. Officer Wanunu was not even facing in the direction of the Respondent at the time of the chokehold. Without a full review of the other officers' statements, the Court has no information before it to determine what their focus was at the time of the chokehold. (Dep't Ex. 6 at.11).

Similarly, I reject the argument that there was no chokehold because Prisoner never told the investigator that there was a chokehold or that there was any interference with his breathing. From Prisoner's interview, it is clear that he didn't remember exactly what had happened to him. As he explained, he had suffered a head injury and was therefore unclear on certain details. There is also no requirement that breathing actually be obstructed in order to find that a chokehold has been applied. Under the Patrol Guide definition as stated above, the pressure applied to the throat need only be such that it may hinder breathing. Additionally, the fact that there are no physical markings on Prisoner's neck that can be attributed to Respondent does not mean that pressure was not applied. There is no requirement in the chokehold definition that the level of pressure applied must be such that it causes physical marks or visible injuries.

I find that since it is more likely than not that Respondent exerted pressure to Prisoner's throat or windpipe in a manner which may have prevented breathing, air intake or blood flow, he is Guilty of Specification 1.

Specification 2 charges Respondent with using wrongful force against a handcuffed and shackled prisoner. Under Patrol Guide 221-01 a Member of Service shall not, "use any level of force on handcuffed or otherwise restrained subjects unless necessary to prevent injury, escape or to overcome active physical resistance or assault."

There is no dispute in this case that Prisoner was both rear-handcuffed and leg shackled at the time Respondent used force to push him against the cell wall twice and then hold him

against the wall by his throat before pushing him to the floor. There is also no dispute that Prisoner sustained a physical injury in that he received seven staples to his head to close the laceration which resulted from Respondent pushing him to the floor.

None of the exceptions to the prohibition on the use of force on a restrained subject apply in this case. Before Respondent entered the cell and pushed Prisoner, Prisoner was alone in the cell. While Prisoner clearly was agitated and had been making verbal threats to harm both officers and the other male, he was not in a position to be able to carry out those threats while alone, handcuffed, and shackled in a cell. Likewise, the shackled Prisoner was not in a position to escape and any concern of escape could have been eliminated by simply keeping the cell door shut after Prisoner had been placed in the cell alone. Furthermore, Prisoner could not have had contact with officers which could constitute physical resistance or assault while alone in the cell.

Respondent did not attempt to deescalate the situation in any way. He did not call for any unit to deal with an agitated person nor did he even follow the simple suggestion of one of the officers to handcuff the other male to the bar near the bench outside the cells until the situation with Prisoner had deescalated. Instead, Respondent went into the cell and yelled and cursed at the shackled Prisoner in an angry manner before placing him in a chokehold and then throwing him to the ground.

Respondent stated in his Department interview that his third push of Prisoner was made in an effort to prevent Prisoner from spitting on him. Even if true, this is not a reasonable justification for the level of force used. Moreover, Prisoner had a face mask covering his mouth at the time he was pushed to the ground.

In sum, the Court finds no justifiable reason for Respondent's use of force on a rear-handcuffed and shackled prisoner. I therefore find the Respondent Guilty of Specification 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on April 14, 1997. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. The Department Advocate argued that Respondent should be terminated.

Respondent has been found guilty of having used a prohibited chokehold and of having gratuitously used excessive force on a restrained prisoner in Department custody resulting in a serious head wound requiring medical treatment. According to the NYPD Disciplinary System Penalty Guidelines, the presumptive penalty for the chokehold alone is termination. After reviewing the totality of circumstances, I find that there are also numerous aggravating factors present which convinced this tribunal that termination is the appropriate penalty in this case.

First, Prisoner was handcuffed and in leg shackles at the time Respondent used a prohibited chokehold. Second, Respondent appeared to be acting out of anger as demonstrated by his yelling and cursing at the Prisoner at the time of the incident and even after he had pushed him to the ground. Respondent did not take actions to deescalate the situation, but instead inflamed matters by insisting that a second male be placed in the cell with Prisoner, who clearly was in an agitated state at the time. If Respondent had kept Prisoner isolated in the cell until alternatives recommended by other officers were found, to either deescalate or secure the other male somewhere else, the matter could likely have been resolved. Third, the excessive force caused physical injury to a shackled prisoner already in Department custody. Moreover, this was not a fast-paced situation that did not allow time for reflection. Prisoner was being verbally disruptive and threatening, but was not a serious physical threat at that time. That Respondent

could have reasonably waited before entering the cell to confront Prisoner negates the defense's mitigation argument that the encounter was brief and didn't allow time for reflection.

Furthermore, it must be noted as an aggravating factor that Respondent was a supervisor on the scene and he acted in front of several subordinates when he angrily yelled at Prisoner, placed him in a chokehold, and pushed him to the ground and continued to yell as he was on the ground. Respondent did not exercise sound judgment or lead by proper example in a situation where he was observed by subordinate members of the service.

Finally, this is not the first time that Respondent has been found guilty of using unwarranted force. Respondent has one prior disciplinary case, wherein he pleaded guilty in 2014, for violent conduct consisting of two separate physical altercations with a family member. At that time, Respondent forfeited 30 penalty days. In light of the instant case, the conduct in that matter shows a disturbing pattern of Respondent's use of unwarranted physical violence against others.

Consistent with the Department Disciplinary System Penalty Guidelines, based on the egregious nature of Respondent's misconduct, the injury he caused by using a chokehold and excessive force on a shackled prisoner and the aggravating factors noted above, I recommend that Respondent be DISMISSED from the Department.

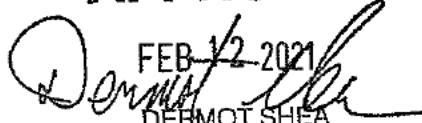
Respectfully submitted,

Nancy Ryan

Nancy R. Ryan

Assistant Deputy Commissioner Trials

APPROVED


FEB 12 2021
DERMOT SHEA
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
SERGEANT FITZROY VIGILANCE
TAX REGISTRY NO. 918667
DISCIPLINARY CASE NO. 2021-23061

Respondent was appointed to the Department on April 14, 1997. On his last three annual performance evaluations, he received a 4.0 overall rating of "Highly Competent" for 2019 and twice received 3.5 ratings of "Highly Competent/Competent" for 2017 and 2018. He has been awarded one medal for Excellent Police Duty and two medals for Meritorious Police Duty. [REDACTED]

In 2014, Respondent forfeited 30 pre-trial suspension days after pleading guilty to participating in physical altercations with [REDACTED] a family member on two separate occasions. Prior to the latter of those incidents, Respondent had been placed on Level I Force Monitoring on May 31, 2013 for having received three or more CCRB complaints in a one-year period. That monitoring was then upgraded to Level II Discipline Monitoring, which ended on March 18, 2015 after eighteen months.

In connection with the instant matter, Respondent was placed on modified assignment on January 4, 2021.

For your consideration.

Nancy Ryan
Nancy R. Ryan
Assistant Deputy Commissioner Trials